Supreme Court, U. S.
FILED
NOV 3 1979
MICHAEL RODAK, JR., CLERK

No. 79-340

In the Supreme Court of the United States

OCTOBER TERM, 1979

WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 2

Question presented 2

Statement 2

Argument 8

Conclusion 17

CITATIONS

Cases:

Aberdeen & Rockfish R.R. v. *Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207 9

City of Mishawaka, Ind. v. *Indiana & Michigan Electric Co.*, 560 F. 2d 1314 9

Dellinger v. *Mitchell*, 442 F. 2d 782 9

Ferguson v. *Tabah*, 288 F. 2d 665 9

Filtrol Corp v. *Kelleher*, 467 F. 2d 242, cert. denied, 409 U.S. 1110 9

Landis v. *North American Co.*, 299 U.S. 248 9

Northwestern Bands of Shoshone Indians v. *United States*, 324 U.S. 335 ..... 12, 15

Pet Milk Co. v. *Ritter*, 323 F. 2d 586 9

Shoshone Tribe v. *United States*, 11 Ind. Cl. Comm. 387 ..... 3, 14-15, 16

Taunton Gardens Co. v. *Hills*, 557 F. 2d 877 9

Page

Cases—(Continued):

Tee-Hit-Ton Indians v. *United States*, 348 U.S. 272 12

Thompson v. *Boyle*, 417 F. 2d 1041, cert. denied, 397 U.S. 972 9

Tlingit & Haida Indians of Alaska v. *United States*, 177 F. Supp. 452 14

United States v. *Dann*, 572 F. 2d 222 ..... 5, 9, 16

United States v. *Gemmill*, 535 F. 2d 1145 14

United States v. *Georgia Pacific Corp.*, 562 F. 2d 294 9

United States v. *Mellon Bank, N.A.*, 545 F. 2d 869 9

United States v. *Midwest Oil Co.*, 236 U.S. 459 14

United States v. *Pueblo of San Ildefonso*, 513 F. 2d 1383 14

Western Shoshone Identifiable Group v. *United States*, 29 Ind. Cl. Comm. 5 3-4

Western Shoshone Identifiable Group v. *United States*, 35 Ind. Cl. Comm. 457, aff'd *sub nom. Western Shoshone Legal Defense and Education Association* v. *United States*, 531 F. 2d 495, cert. denied, 429 U.S. 885 ..... 4, 5-6, 10, 16

Page

Cases (Continued):

Western Shoshone Identifiable Group v. *United States*, 40 Ind. Cl. Comm. 305 7

Western Shoshone Identifiable Group v. *United States*, 40 Ind. Cl. Comm. 318 7

Treaty and statutes:

Treaty of Ruby Valley, 18 Stat. 689:

Article IV 12

Article V 6, 12

Indian Claims Commission Act, 25 U.S.C. 70 *et seq.* :

25 U.S.C. 70a 4

25 U.S.C. 70u 16

Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.* 15

Taylor Grazing Act, 43 U.S.C. 315 *et seq.* 15

Miscellaneous:

Restatement (Second) of Conflict Laws (1971) 16

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 1a-14a) is reported at 593 F. 2d 994. A subsequent order of the Court of Claims filed on April 3, 1979 (Pet. App. 37a-40a) granting a stay of proceedings until May 15, 1979, and an order of June 1, 1979, denying petitioner's motion for rehearing (Pet. App. 15a-16a) are not yet reported. The final award of the Indian Claims Commission (Pet. App. 17a-18a) and order denying petitioner's motion to stay proceedings (Pet. App. 19a-24a), both filed on August 15, 1977, are reported at 40 Ind. Cl. Comm. 318, 453, and 40 Ind. Cl. Comm. 305, respectively.

JURISDICTION

The order of the Court of Claims denying petitioner's timely motion for rehearing was entered on June 1, 1979. The petition for a writ of certiorari was filed on August 30, 1979. The jurisdiction of this Court is invoked under 25 U.S.C. 70s(c) and 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Indian Claims Commission erred in denying petitioner's motion to stay proceedings, made immediately prior to the entry of final judgment and more than 25 years after this action was filed, to permit petitioner to assert in another forum that it retained aboriginal title to some 12 million acres of public land in Nevada, a title which petitioner had consistently argued, and the Indian Claims Commission had previously held, had been extinguished.

STATEMENT

This action originated on August 10, 1951, with the filing before the Indian Claims Commission of a petition alleging a claim for the taking or extinguishment of title to lands on behalf of the entire Shoshone Nation in the States of California, Nevada, Idaho, Utah, Wyoming, and Colorado. In the alternative, separate claims were alleged on behalf of the constituent bands or groups of the Shoshone Nation, one of which was petitioner herein, the Western Shoshone Identifiable Group, as represented by the Te-Moak Bands of Western Shoshone Indians.

Following trial and briefing on the land title issues,[1] the Indian Claims Commission entered an opinion, findings

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[1]Before the Indian Claims Commission, it was the practice to hear cases in three separate trials, one on title, one on valuation, and one on set-offs claimed by the United States.

of fact, and an interlocutory order on October 16, 1962, in which the Commission found that the Western Shoshone Indians held aboriginal title to 24,396,403 acres of land in the present States of California and Nevada. *Shoshone Tribe* v. *United States*, 11 Ind. Cl. Comm. 387, 413-414 (1962).[2] The Commission found that title to the lands in California was extinguished on March 3, 1853. *Id.* at 415. With respect to the Nevada lands, the Commission found that aboriginal title had been extinguished over a period of years through gradual encroachment by whites and the acquisition, disposition, or taking of the Shoshone lands by the United States for its own use and benefit. Because it could not then identify a precise date for these actions, the Commission reserved the question of the dates of extinguishment in Nevada for further proceedings. *Id.* at 416. In order to avoid complex litigation covering the date of extinguishment of aboriginal title for many different parcels, petitioner and the United States subsequently stipulated to an average date of valuation of July 1, 1872, for all lands in Nevada, and the Commission approved that stipulation in 1966. See *Western Shoshone Identifiable Group* v. *United States*, 29 Ind. Cl. Comm. 5, 7 (1972).

In September 1967, the parties proceeded to trial on the value of the Western Shoshone lands at the time of extinguishment of aboriginal title. In 1972 the Commis-

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[2]The Commission chose to consider the claims of the constituent bands or groups of the Shoshone Nation individually, and found that the Western Shoshone constituted a separate indentifiable group for purposes of presenting a claim against the United States. 11 Ind. Cl. Comm. at 421-446. Of the total land to which petitioner once held aboriginal title, 2,184,650 acres were located in California, and 22,211,753 were in Nevada. See *Western Shoshone Identifiable Group* v. *United States*, 29 Ind. Cl. Comm. 5, 6, 63 (1972).

sion entered an opinion, findings of fact, and an interlocutory order establishing the value of plaintiff's lands at $21,550,000. 29 Ind. Cl. Comm. at 125.[3] In October 1973, the parties proceeded to trial before the Commission on the issues raised by set-offs claimed by the United States pursuant to 25 U.S.C. 70a.

In April 1974, while the parties were awaiting a decision on the set-off claims and entry by the Commission of a final award, a group identified as the Western Shoshone Legal Defense and Education Association and Frank Temoke (hereinafter the Association) sought to intervene. The Association claimed that the Western Shoshone aboriginal title had not been extinguished with respect to approximately 12 million acres of the land already valued as lost to the Western Shoshone. The Association sought to present an amended claim, deleting any request for an award for the acres to which it asserted aboriginal title had not been extinguished,[4] and also sought to stay proceedings pending a decision in *United States* v. *Dann*, Civil No. R-74-60 BRT (D. Nev.). In the *Dann* case,

[3]An additional award of $4,604,600 was entered for minerals removed prior to the valuation dates.

[4]The Association asserted that petitioner herein and its counsel acted collusively with the United States in stipulating to the date of extinguishment of aboriginal title for valuation purposes. However, the Indian Claims Commission noted that the United States had denied petitioner's allegations that it had aboriginal title to the lands in Nevada and that aboriginal title was taken by the United States, thereby putting the question of extinguishment in issue. The stipulation to a specific average date of extinguishment for purposes of valuation was viewed by the Commission as an entirely appropriate means by which the parties could avoid a trial on the actual date of extinguisment of aboriginal title for each parcel of land within the claims area. *Western Shoshone Identifiable Group* v. *United States*, 35 Ind. Cl. Comm. 457, 466-470 (1975).

which had been commenced on May 6, 1974, the United States sought damages in trespass against several Western Shoshone Indians for grazing stock without a permit under the Taylor Grazing Act, 43 U.S.C. 315, *et seq.*, on certain public lands within the 12 million acres at issue in the Association's motion to intervene. The *Dann* defendants defended on the grounds that the Western Shoshone title had not been extinguished.[5]

Petitioner and the United States opposed the Association's attempt to intervene and to stay proceedings, and the Indian Claims Commission dismissed the petition. The Commission concluded, *inter alia*, that the question of extinguishment of aboriginal title to the lands in Nevada had been presented to and decided by the Commission. *Western Shoshone Identifiable Group* v. *United States*, 35 Ind. Cl. Comm. 457, 465-471 (1975). On appeal to the Court of Claims, petitioner (and the United States) argued in support of the Commission's determinations, which were affirmed. *Western Shoshone Legal Defense and Education Association* v. *United States and Western Shoshone Identifiable Group*, 531 F. 2d 495

[5]The district court in *Dann* held for the United States on the ground that the decision by the Indian Claims Commission collaterally estopped the defendants from asserting that the Western Shoshone's aboriginal title had not been extinguished. The court of appeals reversed, holding that the decision by the Indian Claims Commission in the instant case did not collaterally estop the defendants because the judgment in the present case had not yet become final. The court of appeals also concluded that the defendants would not be estopped by a judgment in the present case because the question of extinguishment was not actually litigated by the Indian Claims Commission. The court therefore remanded to the district court for trial on the Western Shoshone's aboriginal title. *United States* v. *Dann*, 572 F. 2d 222 (9th Cir. 1978). The case is now under submission to the district court on cross motions for summary judgment (Pet. 16).

(1976). Both the United States and petitioner opposed the Association's petition for a writ of certiorari, and this Court denied the petition. 429 U.S. 885 (1976). Petitioner argued in its brief in opposition in this Court that the question of extinguishment had been put in issue in the earlier proceedings before the Indian Claims Commission and that the decision by the Commission and the Court of Claims that its aboriginal title had been extinguished was correct. Brief in Opposition for Respondent, The Western Shoshone Identifiable Group, 4-9 & n.14 (No. 76-90, Oct. Term 1976).

After all of the above proceedings, petitioner reversed the litigating position it had taken for over 25 years and filed motions with the Indian Claims Commission on November 15, 1976, and January 24, 1977, for a stay of proceedings[6] so that it might pursue other administrative or judicial remedies to claim that it still held aboriginal title to 12 million acres in the claims area.[7] In doing so petitioner in effect adopted the position of the Association it had only recently opposed. In February 1977, petitioner requested the President and the Secretary of the Interior to determine its title to national forest and public domain lands within the area described in Article V of the Treaty (Pet. 7).

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[6]This position was taken through new counsel for petitioner pursuant to a special contract. Traditional counsel for petitioner continued to appear before the Indian Claims Commission and the Court of Claims, and neither tribunal felt it necessary to decide who properly represented petitioner.

[7]The approximately 12 million acres involved are the lands described in Article V of the Treaty of Ruby Valley (Pet. App. 31a) which are still in public ownership (Pet. 5). Petitioner concedes that its aboriginal title to the acreage in Nevada outside the area described in Article V of the Treaty and lands within that area that have passed into private ownership has been extinguished (*ibid.*). The 12 million acres are now national forests or public domain lands.

The United States opposed the motion for a stay in the present case, and on August 15, 1977, the Commission denied the motion. *Western Shoshone Identifiable Group* v. *United States*, 40 Ind. Cl. Comm. 305 (1977). On the same day, the Commission entered a final award in the amount of $26,145,189.89. *Western Shoshone Identifiable Group* v. *United States*, 40 Ind. Cl. Comm. 318, 453 (1977). Petitioner then appealed from the Commission's denial of the stay, but did not appeal the Commission's final judgment holding that its title to 12 million acres had been extinguished. The United States again opposed petitioner's request for a stay.[8]

After the case was taken under submission by the Court of Claims, petitioner and the United States jointly moved on February 15, 1979, for a brief stay in that court to provide a last opportunity for discussions about petitioner's claim that it retained aboriginal title to 12 million acres. The Court of Claims denied this joint motion insofar as it might have been intended to withdraw submission of the case to the court, and on February 21, the Court of Claims affirmed the Commission's denial of petitioner's request for a stay (Pet. App. 1a-6a). However, on April 3, the Court of Claims granted the joint motion for a stay of proceedings in that court to May 15, 1979, and withheld its decision on rehearing — and therefore the entry of final judgment—until after that date (Pet. App. 37a-40a). The Department of the Interior initially agreed during this time to study petitioner's claim with a view toward a possible recommendation that

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[8]The United States also cross-appealed from the award of damages for minerals removed prior to the stipulated date of valuation of petitioner's title, July 1, 1872. The Court of Claims affirmed this award (Pet. App. 8a-14a).

Congress enact legislation establishing a reservation for petitioner. The Department subsequently decided not to make such a recommendation, and after the temporary stay to May 15 expired, the Court of Claims denied petitioner's request for rehearing (Pet. App. 15a-16a).

On June 27, the Secretary of the Interior formally notified petitioner that he had decided not to undertake a program to establish additional reservation lands for petitioner and that the Department would not undertake any further efforts ro settle the present litigation (Pet. App. 41a). On August 27, 1979 petitioner filed suit against the Secretary of the Interior and Secretary of Agriculture in the United States District Court for the District of Columbia to determine that petitioner retains aboriginal title to 12 million acres of public lands described in Article V of the Treaty of Ruby Valley (Pet. 9; *Te-Moak Bands of Western Shoshone Indians, Nevada* v. *Andrus, et al.* (Civ. No. 79-2229)).

On August 30, petitioner filed a petition for a writ of certiorari to review the decision of the Court of Claims affirming the Indian Claims Commission's denial of a stay.

ARGUMENT

Petitioner contends that the Indian Claims Commission erred in denying its motion for a stay. Petitioner correctly acknowledges (Pet. 15) that if the judgment of the Court of Claims becomes final, petitioner would be barred from asserting a claim against the United States that it retains aboriginal title to the 12 million acres in Nevada. 25 U.S.C. 70u; see Pet. App. 8a, 34a. Petitioner therefore seeks a stay pending the determination in another forum—presumally either in the action brought by the Te-

Moak Bands in the District of Columbia[9] or the trespass action brought by the United States in the District of Nevada, *United States* v. *Dann, supra*—that it still has aboriginal title to the lands in question.

1. The power to grant or deny a stay is within the discretion of a court. *Landis* v. *North American Co.*, 299 U.S. 248, 254-259 (1936). Appellate review of the propriety of the granting or denial of a stay of proceedings is limited to determining if the lower tribunal has abused its discretion. *Aberdeen & Rockfish R.R.* v. *Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207, 1218 (1972) (Burger, Circuit Justice); *United States* v. *Georgia Pacific Corp.*, 562 F. 2d 294, 296-297 (4th Cir. 1977); *City fo Mishawaka, Ind.* v. *Indiana & Michigan Electric Co.*, 560 F. 2d 1314, 1324-1325 (7th Cir. 1977); *Taunton Gardens Co.* v. *Hills*, 557 F. 2d 877, 878-879 (1st Cir. 1977); *United States* v. *Mellon Bank, N.A.*, 545 F. 2d 869, 872-874 (3d Cir. 1976); *Filtrol Corp.* v. *Kelleher*, 467 F. 2d 242, 245 (9th Cir. 1972), cert. denied, 409 U.S. 1110 (1973); *Dellinger* v. *Mitchell*, 442 F. 2d 782, 786 (D.C. Cir. 1971); *Thompson* v. *Boyle*, 417 F. 2d 1041, 1042 (5th Cir. 1969), cert. denied, 397 U.S. 972 (1970); *Pet Milk Co.* v. *Ritter*, 323 F. 2d 586, 588 (10th Cir. 1963); *Ferguson* v. *Tabah*, 288 F. 2d 665, 672 (2d Cir. 1961). Because petitioner had for over 25 years taken the position that its title was extinguished, and because the stay was not requested until the very eve of entry of a

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[9]Petitioner Western Shoshone Identifiable Group is comprised of a number of groups including the Te-Moak Bands, which were held by the Indian Claims Commission to be the exclusive representative of all Western Shoshone Indians before the Commission (Pet. 3 n.1). The Te-Moak Bands filed the action on August 27, 1979, in the District of Columbia as a representative of all Western Shoshone Indians in Nevada as well. Complaint para. 5, *Te-Moak Bands of Western Shoshone Indians, Nevada* v. *Andrus, et al.*, Civ. No. 79-2229 (D.D.C.).

final judgment, the Court of Claims properly found that the Commission had not abused its discretion when it denied the request for a stay. Similarly, the Court of Claims itself did not abuse its discretion in granting but a limited stay of proceedings until May 15, 1979.

2. Petitioner contends, however, that it has never had the opportunity to have the merits of its title claim determined (Pet. 9-11). This assertion is refuted by the record.

After the Association sought to intervene in the case in 1974, petitioner argued and (although petitioner now contends otherwise (Pet. 11)) the Indian Claims Commission expressly held that the Commission had before it evidence of extinguishment and that the Commission actually decided that petitioner's aboriginal title was extinguished. *Western Shoshone Identifiable Group* v. *United States*, 35 Ind. Cl. Comm. 457, 466-467 (1975), aff'd *sub nom. Western Shoshone Legal Defense and Education Association* v. *United States*, 531 F. 2d 495, 500 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976). Thus, petitioner had the opportunity when the issue was vividly brought to its attention at the time of the Association's attempted intervention, and indeed before, to argue that its aboriginal title to 12 million acres had not been extinguished. The Commission's determination at the time of the Association's attempted intervention that petitioner's aboriginal title was extinguished and that the Commission actually decided this question is now the law of the case, and it was entirely proper for the Commission to deny petitioner's subsequent request for a stay premised on a contrary legal position.

Furthermore, even after petitioner decided to change its litigating position and to claim that it retained aboriginal title to some 12 million acres, petitioner did not appeal to

the Court of Claims any of the determinations of the Commission that its title was extinguished. Petitioner confined its appeal to the issue of whether the Indian Claims Commission properly declined to stay proceedings.

Finally, it should be noted that petitioner initially sought the stay in the Commission and before the Court of Claims in large part in order to provide the Secretary of the Interior with an opportunity to determine *administratively* that petitioner retained aboriginal title to the 12 million acres in question. After reviewing petitioner's claims, the Department of the Interior concluded that it would not make such a determination administratively, although it did briefly consider the possibility of recommending that Congress enact legislation establishing a reservation for the Western Shoshone. Thus, petitioner has had the opportunity to make a presentation to the responsible Executive officials, as well, and did not meet with success. The Department's decision not to take administrative action on petitioner's claim and its determination that legislation would be necessary have removed a principal reason underlying petitioner's original request for a stay.

3. Petitioner broadly asserts that the actions of the Indian Claims Commission and the Court of Claims denying a stay work an injustice. This assertion is also without merit.

a. Petitioner stands to recover more than $26 million for the government's taking or extinguishment of its aboriginal title. This is a substantial sum by any measure, and it is compensation that Congress was not obligated to provide.

The Treaty of Ruby Valley did not "recognize" or confer on petitioner any property rights as against the

United States with respect to the more than 22 million acres of Nevada land involved in the present case. Article V of the Treaty merely acknowledged that the Western Shoshone *claimed* the lands described in that Article (Pet. App. 31a). See *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335 (1945). Accordingly, even if a court were to determine that the United States had never acquired or extinguished the Western Shoshone's aboriginal title to the 12 million acres petitioner now claims, and that petitioner therefore retains a present right to occupy those lands, Congress could immediately enact legislation extinguishing this right of occupancy without paying *any* compensation. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

The award of $26 million to petitioner may well constitute less than the present market value of a fee simple interest in the 12 million acres which petitioner now claims. But petitioner would not have a fee simple interest in the land or a right to occupy it permanently even if a court were to find that petitioner's aboriginal title has not yet been extinguished. The present market value of aboriginal title—an interest in property that is subject to immediate termination at the will of the Congress—is worth considerably less than a fee simple interest and probably less than the $26 million petitioner has recovered below.

What is more, Article IV of the Treaty of Ruby Valley provides that the area claimed by the Western Shoshone in that Treaty may be mined and opened for settlements and ranches and that timber may be taken for building, mills and other purposes. Thus, even without congressional action, the Executive may authorize extensive use of the lands to which petitioner now claims aboriginal

title. This makes petitioner's aboriginal title worth less than if congressional action were necessary to permit such competing uses. Thus, there is no reason to believe that petitioner will suffer any injustice by the recovery of $26 million.

b. Perhaps in recognition of the adequacy of the compensation awarded by the Commission, petitioner argues (Pet. 11) that the denial of a stay works an injustice because land is of more importance to it than money: money, once spent, is gone, but tribal lands protected by federal law from alienation can last forever to sustain the culture of the Western Shoshone. We appreciate the importance of land to the preservation of Indian culture, but this factor likewise does not warrant the granting of a stay here.

As explained above, even if petitioner were to succeed in demonstrating that it retains aboriginal title to 12 million acres in Nevada, Congress could immediately terminate that right without paying any compensation. An interest in land so readily terminated would not provide the security necessary to maintain petitioner's traditional culture. There is, moreover, every reason to believe that Congress would act promptly following a court decision in the District of Columbia or Nevada upholding petitioner's claim of aboriginal title to restore some or all of the 12 million acres now claimed to national forests, grazing, or other public uses, in view of the heretofore uninterrupted use of the lands for these purposes. In that event, a stay of the present proceedings pending other judicial proceedings would have served no useful purpose.

There is, moreover, little likelihood that petitioner could succeed on the merits of its claim that the Western Shoshone aboriginal title to 12 million acres has not been

extinguished. The opening of the public domain for grazing and the establishment of national forests would appear to be entirely consistent with the terms of Article IV of the Treaty of Ruby Valley, discussed above, permitting the establishment of ranches and taking of timber, thereby undercutting petitioner's argument (Pet. 10 n.15) that these exercises of complete dominion over the land by the Executive did not have the congressional sanction petitioner maintains (*ibid.*) is necessary to extinguish aboriginal title. And the Treaty to one side, the creation of national forests and the opening of lands for grazing, now conducted under the Taylor Grazing Act, could themselves operate to extinguish aboriginal title, particularly where these actions have gone undisturbed for a long period of time. *United States* v. *Gemmill*, 535 F. 2d 1145, 1148-1149 (9th Cir. 1976); *United States* v. *Pueblo of San Ildefonso*, 513 F. 2d 1383, 1386 (Ct. Cl. 1975); *Tlingit & Haida Indians of Alaska* v. *United States*, 177 F. Supp. 452, 466-468 (Ct. Cl. 1959). Cf. *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 475 (1915).

4. Even when the judgment in the present case becomes final and petitioner is barred from claiming before the Executive or in court that it retains aboriginal title to the lands embraced by the judgment, Congress would remain free to establish a reservation for the Western Shoshone. The denial of a stay below therefore does not foreclose petitioner from obtaining what is apparently its ultimate objective: a reservation.

Further, Congress is the appropriate forum for the consideration of petitioner's present-day demands for land. In aboriginal times, the largest permanent unit of organization among the Western Shoshone was the village; organization superseding that level was only temporary, although shifting and informal political and subsistence bonds interlocked the villages. 11 Ind. Cl.

Comm. at 391. At the present time, some Western Shoshone live on scattered tracts of trust land purchased in the 1930's and 1940's pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, and others live in towns and rural areas throughout the claims area (Pet. 6 n.10). Petitioner has been without a large reservation since the Treaty of Ruby Valley was entered into more than 100 years ago. Whether such a reservation—or a series of smaller colonies—should now be established therefore raises difficult questions of policy for the Executive and the Congress which do not comfortably lend themselves to judicial resolution. As the Court of Claims stated in affirming the Commission's denial of petitioner's motion for a stay (Pet. App. 8a):

> [I]t is only Congress that could stay and undo the course of litigation at this late date, and if anybody should, it is only Congress. The essential point of the matter is that the Temoak's true appeal is to legislative grace, not as of right to this court.

See also *Northwestern Bands of Shoshone Indians* v. *United States*, *supra*, 324 U.S. at 354-358.

There is therefore no occasion to stay proceedings in the present case on the eve of final judgment in favor of other judicial proceedings in which petitioner is most unlikely to prevail and which would, in any event, be but one step toward eventual congressional action. Denial of a stay by the courts below was especially appropriate here because the effect of the stay would be to thwart the effectiveness of the claims procedure Congress has already established to provide a remedy for aboriginal

claims. If land, rather than money, is the preferred remedy at the present time, that proposal should be presented to the Congress.[10]

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[10]The Ninth Circuit held in *United States* v. *Dann, supra*, that the decision by the Indian Claims Commission in the instant case that petitioner's aboriginal title had been extinguished did not collaterally estop the defendants in *Dann* from defending the trespass action brought by the United States on the ground that petitioner's aboriginal title, on which they relied, had *not* been extinguished. The principal basis for this holding was that the judgment in the instant case had not yet become final and therefore did not give rise to collateral estoppel. Contrary to petitioner's suggestion (Pet. 16-17), this holding is not in conflict with the decisions below. The Indian Claims Commission and the Court of Claims did not rely on the doctrine of collateral estoppel in denying a stay. They merely concluded that the equities did not weigh in favor of petitioner's request for a stay, in view of the lateness of petitioner's change in litigating strategy (Pet. App. 5a-8a, 22a-23a).

The Ninth Circuit went on to find, however, that the question of extinguishment of aboriginal title had not actually been decided by the Indian Claims Commission and that the doctrine of collateral estoppel would not apply in the *Dann* case for this additional reason as well. This holding by the Ninth Circuit is in conflict with the express holding by the Commission that petitioner's aboriginal title was extinguished, 11 Ind. Cl. Comm. at 416, 445, and its later holding at the time it considered the Association's motion to intervene that the Commission had considered and decided this question, 35 Ind. Cl. Comm. at 465-471. The decision of the forum in which the case was litigated—the Indian Claims Commission—should control with respect to what issues were necessary to its judgment and were actually litigated. Cf. *Restatement (Second) of Conflict of Laws* §95 (1971), and the Commission's conclusion here is clearly correct. Moreover, the *Dann* defendants were members of the Association that sought to intervene in the present case in 1974, *United States* v. *Dann, supra*, 572 F. 2d at 225, and they should therefore be bound by the Commission's rejection of the Association's argument that the extinguishment issue was not litigated. In any event, the significance of any conflict on this question will disappear upon entry of final judgment in the present case, because a judgment based on extinguishment of petitioner's title will bar petitioner, and all those in privity with petitioner, from asserting that petitioner retains aboriginal title. 25 U.S.C. 70u; Pet. App. 34a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1979

DOJ-1979-11